Supreme Court, U.S.
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No. 04-79

IN THE

Supreme Court of the United States

MARIA DEL ROSARIO ORTEGA, SERGIO BLANCO, by themselves and representing minors BEATRIZ BLANCO-ORTEGA AND PATRIZIA BLANCO-ORTEGA,

Petitioners,

v.

STAR-KIST FOODS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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Petition for Certiorari Filed July 16, 2004
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RELEVANT DOCKET ENTRIES

I. BEFORE THE UNITED STATES DISTRICT COURT DISTRICT OF PUERTO RICO (SAN JUAN), CASE NO. 3:00-cv-01475-SEC

1	04/18/2000	COMPLAINT
	04/18/2000	SUMMONS issued for Star Kist Caribe Inc, Star Kist Foods, Inc, A-Z, Ins. Co.
2	07/10/2000	MOTION by Star Kist Foods, Inc to Dismiss, w/unsworn statements and exhs attached. Response due 7/24/00.
17	12/06/2000	PARTIAL RESPONSE by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega in opposition to motion to Dismiss by Star Kist Foods, Inc
20	12/07/2000	MOTION by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega to Compel dfts to adequately ans plfs' diversity discovery w/attachs.
22	12/19/2000	ORDER informative motion Noted. denying motion to Compel dfts to adequately ans plfs' diversity discovery (signed by Judge Salvador E. Casellas)
23	12/19/2000	RESPONSE by Star Kist Caribe Inc, Star Kist Foods, Inc in opposition to motion to Compel dfts to adequately ans plfs' diversity discovery by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega

24	12/19/2000	REPLY by Star Kist Foods, Inc to response to motion to Dismiss by Star Kist Foods, Inc, w/attachs.
25	02/02/2001	OPINION AND ORDER granting in part, denying in part motion to Dismiss. Jgmt shall be entered dismissing the complaint against Star Kist Caribe in accordance w/the terms of this O&O. (signed by Judge Salvador E. Casellas)
26	02/02/2001	PARTIAL JUDGMENT dismissing the complaint against Star Kist Caribe, Inc. as per O&O of even date. (signed by Judge Salvador E. Casellas)
31	02/26/2001	ANSWER to Complaint by Star Kist Foods, Inc
32	02/28/2001	MOTION by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega to Amend complaint w/ tendered doc attached.
35	03/23/2001	ORDER granting motion to Amend complaint. Dft shall file a resp w/in 20 days of this order, Answer deadline to 4/16/01 for Star Kist Foods, Inc (signed by Judge Salvador E. Casellas)
36	03/23/2001	AMENDED COMPLAINT by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega (Answer due 4/2/01 for Star Kist Foods, Inc) amending complaint

39	04/10/2001	ANSWER by Star Kist Foods, Inc to amended complaint.
44	05/21/2001	MOTION by Star Kist Foods, Inc to Dismiss, w/attachs. Response due 6/4/01. Modified on 05/24/2001
47	06/05/2001	RESPONSE by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega in opposition to motion to Dismiss by Star Kist Foods, Inc
49	06/18/2001	RESPONSE by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega in opposition to motion to Dismiss by Star Kist Foods, Inc
53	07/19/2001	REPLY by Star Kist Foods, Inc to response to motion to Dismiss by Star Kist Foods, Inc
56	10/24/2001	MOTION by Star Kist Foods, Inc for Summary Judgment, w/attachs. Response due 11/6/01.
76	10/30/2001	NOTICE OF APPEAL order, judgment order, opinion order by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega. Transcript Order Form furnished to appellant
64	01/03/2002	RESPONSE by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega in opposition to motion for Summary Judgment by Star Kist Foods, Inc, w/ attachs.

66	02/05/2002	REPLY by Star Kist Foods, Inc to response to motion for Summary Judgment by Star Kist Foods, Inc, w/supplement attached. Modified on 02/07/2002
67	07/26/2002	ORDER mooting motion to Dismiss (signed by Judge Salvador E. Casellas)
68	07/26/2002	OPINION AND ORDER granting w/o prej. motion for Summary Judgment (signed by Judge Salvador E. Casellas)
69	07/26/2002	JUDGMENT dismissing this case w/o prej. (signed by Judge Salvador E. Casellas)
	07/28/2002	Case closed
70	08/07/2002	MOTION by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega for Reconsideration of judgment order Response due 8/20/02.
71	08/21/2002	SUPPLEMENTAL MOTION by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega for Reconsideration of motion for Reconsideration of judgment order by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del- Rosario Ortega referring to: motion for Reconsideration of judgment order by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega. Response due 9/3/02.

72	08/23/2002	RESPONSE by Star Kist Foods, Inc in opposition to motion for Reconsideration of judgment order by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega, supplemental motion for Reconsideration of motion for Reconsideration of judgment order by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega, w/attachs. Modified on 08/26/2002
73	08/28/2002	REPLY by plfs to response to motion for Reconsideration of judgment order by plfs, supplemental motion for Reconsideration of motion for Reconsideration of judgment order by plfs by plfs, w/attachs. Modified on 08/29/2002
74	09/12/2002	RESPONSE by Star Kist Foods, Inc in opposition to motion for Reconsideration of judgment order by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega, supplemental motion for Reconsideration of motion for Reconsideration of judgment order by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega by Patrizia Blanco-Ortega, Blanco-

		Ortega, Sergio Blanco, Maria del-Rosario Ortega
75	10/25/2002	ORDER denying motion for Reconsideration of judgment order denying supplemental motion for Reconsideration of motion for Reconsideration of judgment order by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega (signed by Judge Salvador E. Casellas)
76	10/30/2002	NOTICE OF APPEAL order, judgment order, opinion order by Maria del-Rosario Ortega, Sergio Blanco, Blanco-Ortega, Patrizia Blanco-Ortega. Transcript Order Form furnished to appellant Appeal record due on 11/12/02
	11/22/2002	Certified and transmitted Record on Appeal to U.S. Court of Appeals: appeal by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega, appeal by Patrizia Blanco-Ortega, Blanco-Ortega Sergio Blanco, Maria del-Rosario Ortega (dkts #1-76)
	02/27/2003	USCA Case Number Re: appeal by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega, appeal by Patrizia Blanco-Ortega, Blanco-Ortega, Sergio Blanco, Maria del-Rosario Ortega USCA NUMBER: 02-2530 Modified on 03/17/2003

78	06/09/2004	Printed Opinion of USCA dated June 2, 2004 as to 76 Notice of Appeal, filed by Sergio Blanco, Maria del-Rosario Ortega, Blanco-Ortega, Patrizia Blanco-Ortega, 76 Notice of Appeal, filed by Sergio Blanco, Maria del-Rosario Ortega, Blanco-Ortega, Patrizia Blanco-Ortega. The judgment of the district court is AFFIRMED as to Beatriz's family members. As to Beatriz, the judgment is VACATED and the case is REMANDED.
	07/01/2004	Appeal Record Returned: Notice of Appeal
82	07/27/2004	First MOTION to Continue *Pre-Trial Conference; Informing Filing of Certiorari Before Supreme Court; and To Convert Conference* filed by Freddie Perez-Gonzalez on behalf of all plaintiffs (Perez-Gonzalez, Freddie)
85	09/02/2004	ORDER setting aside Order setting pretrial and settlement conference pending resolution of Plaintiffs' petition for certiorari. Signed by Judge Salvador E Casellas on 9/2/2004.

II. BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, CASE NO. 02-2530

1.	12/13/02	CIVIL CASE docketed. Opening forms sent. Notice filed by Appellants Maria del Rosario Ortega and Sergio Blanco. Appearance form due 12/27/02. Docketing Statement due 12/27/02. Transcript Report/ Order due 12/27/02.
2.	12/13/02	RECORD filed: 3 vol(s). Volume I: 1-24; Volume II: 25-60; Volume III: 61-76.
3.	4/4/03	BRIEF filed by Appellants Maria del Rosario Ortega and Sergio Blanco. Length: 3/31/03, Copies: 10, delivered by Mail. Certificate of service date 3/31/03. Appellee brief due 5/5/03. Reply brief due 5/19/03.
4.	4/4/03	APPENDIX filed by Appellants Maria del Rosario Ortega and Sergio Blanco. Copies: 5. Volumes: 1. Delivered by Mail, filed. Certificate of service date 3/31/03.
5.	5/13/03	BRIEF filed by Appellee Star Kist Foods, Inc. Length: 61, Copies: 9, delivered by Mail. Certificate of service date 5/12/03. Reply brief due 5/27/03.
6.	5/13/03	DISCLOSURE STATEMENT on behalf of Appellee Star Kist Foods, Inc filed.
7.	7/1/03	REPLY BRIEF filed by Appellants Maria del Rosario Ortega and Sergio Blanco. Length: 18 pages, Copies: 9, delivered by Mail. Certificate of service date 7/1/03.
8.	9/24/03	Assigned for the month of November, (11/5/03).

9.	11/5/03	CASE ARGUED 11/05/03. Boudin, Ch. J., Torruella, Lynch, JJ.
10.	11/10/03	SUPPLEMENTAL AUTHORITY pursuant to FRAP 28j filed by Appellants Maria del Rosario Ortega and Sergio Blanco. Certificate of Service not included.
11.	6/2/04	OPINION filed. Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Sandra L. Lynch. Signed Judge Sandra L. Lynch, Authoring Judge PUBLISHED.
12.	6/2/04	JUDGMENT entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Sandra L. Lynch.
13.	6/24/04	MANDATE ISSUED.
14.	6/25/04	RECORD consisting of three volume of original proceedings: vol. 1 contains docket entries 1-24, vol. 2 contains docket entries 25-60, vol. 3 contains docket entries 61-76 returned to originating court.
15.	7/19/04	U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari which was filed in the Supreme Court on 7/16/04. Supreme Court case number: 04-79.
16.	10/25/04	U.S. SUPREME COURT ORDER granting petition for writ of certiorari filed in the Supreme Court on 04-79. The case is consolidated with No. 04-70 and a total of 90 minutes is allotted for oral argument.

[Dated April 14, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MARIA DEL ROSARIO ORTEGA and SERGIO BLANCO, by themselves and representing minors BEATRIZ BLANCO ORTEGA and PATRIZIA BLANCO ORTEGA Plaintiffs vs. STAR-KIST CARIBE, INC.; STAR-KIST FOODS, INC.; and INSURANCE COMPANIES XYZ Defendants	CIVIL NO.:_____ CIVIL ACTION **PLAINTIFFS DEMAND TRIAL BY JURY**

COMPLAINT

TO THE HONORABLE COURT:

Plaintiffs, through their undersigned attorneys, for their cause of action respectfully allege as follows:

I

Jurisdiction and Venue

1. This is a tort action based on products liability due to the negligence of the defendants who market and sell in Puerto Rico lunch kits which contain a pull-top easy-open can of tuna that when opened have a sharp edge lid which is dangerous to people, specially children, and have no warning to this respect.

2. On April 21, 1999, one of the before mentioned lids injured Beatriz Blanco Ortega's right-hand little finger when she opened one of the mentioned cans of tuna.

3. Plaintiffs are all citizens of Puerto Rico.

4. Defendants are all citizens and residents of a state other than Puerto Rico.

5. The matter in controversy exceeds $75,000 exclusive of interests and costs.

6. The can of tuna was sold in Puerto Rico.

7. The cause of action arose in Puerto Rico and the witnesses are in Puerto Rico.

8. Based on the before stated, jurisdiction of this court lies in diversity of citizenship, pursuant to 28 U.S.C. Sec. 1332(a) and venue lies in this district.

II
The Parties

9. Star-Kist Caribe, Inc. is a foreign corporation organized under the laws of Delaware and authorized to do business in Puerto Rico.

10. Defendant Star-Kist Foods, Inc. is a corporation, organized under the laws of a state other than Puerto Rico, with principal offices in Newport, Kentucky, dedicated to the manufacture, distribution, and sale of processed tuna.

11. The aforementioned corporations will be referred to as "Starkist".

12. Codefendants XYZ Insurance Companies are the fictitious names of the insurance companies, which had issued and maintained in full force and effect an insurance policy on behalf of Starkist under whose terms and conditions they are jointly and severally liable with its insured for the facts and damages herein, and assumes the citizenship of their insured. Once the identities of said insurance companies are known, the plaintiffs will request

leave to amend the complaint to incorporate their correct names.

13. Plaintiff Maria del Rosario Ortega (Mrs. Rosario) is a resident of Puerto Rico and is the divorced mother and legal guardian with custody over her minor daughter, Beatriz Blanco Ortega and Patrizia Blanco Ortega.

14. Plaintiff Sergio Blanco (Mr. Blanco) is a resident of Puerto Rico and is the divorced father and legal guardian of Beatriz Blanco Ortega.

15. Plaintiff, Beatriz Blanco Ortega ("Beatriz") is ten (10) years old, a resident of Puerto Rico, and the youngest daughter Mrs. Ortega and Mr. Blanco.

16. Plaintiff Patrizia Blanco Ortega is a minor and the oldest sister of Beatriz Blanco Ortega; she is a citizen of Puerto Rico.

III
The Facts

17. Starkist is engaged in interstate commerce as a manufacturer and retailer of cans of tuna that are sold to the public or consumers through various wholesalers and retailers.

18. For various years, Starkist has been doing business and selling canned tuna in different forms and methods in Puerto Rico, either by itself or through various wholesalers, retailers or distributors.

19. On or about April 21, 1999, while Beatriz was at her school lunch break, she opened a can of tuna in a Starkist Charlie's Tuna Salad Lunch Kit ("the lunch kit") which is manufactured and placed in the market for sale and/or distribution by defendants.

20. Mrs. Ortega had selected and placed the lunch kit in her daughter's lunch box because, among other reasons, the lunch kit was represented by its manufacturer to be of good taste, enjoyable, and easy to prepare, which made it ideal for children to bring to school for lunch brakes.

21. Beatriz opened the lunch kit's can of tuna following the instructions of the package, and while doing so she slit her right-hand little finger with the sharp edge of the lid of the can.

22. Beatriz's injury was of such nature that she had to be taken by her mother to the Emergency Room of the Ashford Presbiterian Hospital in San Juan, Puerto Rico, where she was referred to a hand's specialist.

23. The hand's specialist determined that Beatriz finger's flexor tendon and digital nerve needed to be repaired and recommended surgery.

24. Because there were no operating rooms available, Beatriz had to wait for surgery until April 22, 1999.

25. After surgery Beatriz suffered difficulties as a result of the anesthesia.

26. Thereafter Beatriz had to remain with a cast on her right arm that had a string sown to her finger nail in order to protect the tendon and keep the finger bent which gave her a weird appearance.

27. In order to recover the movement lost in her right-hand little finger Beatriz had to receive physical therapy which caused her pain and anguish.

28. However, as of this date, Beatriz's finger has not fully recovered and is still bent which makes her hand to look awkward and strange.

IV
The Negligence and Direct Cause

29. The proximate and direct cause of Beatriz's injures is defendant Starkist's negligence in manufacturing and marketing for public consumption a product that is unsafe to the consumer, particularly children.

30. Starkist also omitted a notice of precaution to be taken by children or for parents to be given to children, when

opening a can that is unreasonably dangerous to a child, or to parents as consumers.

31. When Beatriz opened the can of tuna she was unaware of any danger to which she would be exposed as a result thereof.

32. All of the above caused injuries and damages to the plaintiffs.

33. The dangerous situation created by the defendants to which Beatriz was exposed was not known by her who at the time was nine years old.

34. Beatriz's parents relied on the safety of the product manufactured and/or marketed by the defendants.

35. The defendants were negligent in breaching their duty to place in the open market a product that is fit for public consumption, particularly children.

36. The breach of defendants' duty was the direct cause of the injuries and damages sustained by the plaintiffs.

V
The Damages

37. Beatriz is a ten (10) year-old child who lives with her mother, has a good relationship with her father, attends school every day, and used to practice volleyball.

38. Due to defendant's negligence, Beatriz suffered a painful cut in her right-hand little finger and went through the horrifying experience of watching herself bleed profusely with no control over it.

39. This experience traumatized and caused her great emotional pain and suffering to the extent that she does not eat tuna fish anymore.

40. After surgery Beatriz had to suffer the discomfort and effect of general anesthesia; then for a prolonged period of time she underwent painful therapy.

41. Because of defendant's negligence, Beatriz's finger is bent, her hand appearance is awkward, and she has problems when writing.

42. To prevent her finger from bending, Beatriz needs to use a cast which she rejects and has developed antipathy to.

43. Due to defendant's negligence, Beatriz' parents and sister went through the anguishing experience of watching their younger daughter and sister being injured, nervous and in extreme pain, which has traumatized and caused them great emotional pain and suffering.

44. Both, Mrs. Ortega and Mr. Blanco have incurred in the following medical expenses:

45. Plaintiffs' damages are estimated in the following amounts:

A. Beatriz

(1) Physical damages, not less than $500,000

(2) Emotional damages, not less than $400,000

B. Mrs. Ortega

(1) Incurred medical expenses as of the date of this complaint $4,927.07

(2) Estimated future medical expenses $25,000

(3) Mental anguish and suffering $250,000

C. Mr. Sergio Blanco's emotional damages are estimated in the sum of $175,000

D. Patrizia Blanco Ortega emotional damages estimated in the sum of $150,000

WHEREFORE, plaintiffs pray for a judgment in their favor and against defendants, ordering payment of the amounts above mentioned, together with interests thereon from the date of filing the present complaint, plus costs, and reasonable attorney's fees.

PLAINTIFFS DEMAND TRIAL BY JURY.

In San Juan, Puerto Rico, this 14th day of April, 2000.

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UDSC-PR 119005

[Dated Jan. 31, 2001]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MARIA DEL ROSARIO-ORTEGA, et. al.	*	
Plaintiffs	*	
	*	
v.	*	**Civil No.**
	*	**00-1475(SEC)**
STAR-KIST CARIBE, INC., et. al.	*	
Defendants	*	

****

OPINION AND ORDER

Pending before the Court is Defendants' motion to dismiss for lack of subject matter jurisdiction. **(Docket # 2)**.[1] For the reasons stated below, Star-Kist's motion to dismiss is **GRANTED IN PART AND DENIED IN PART.** Judgment shall be entered accordingly.

I. Background

Plaintiffs' complaint, filed on April 7, 2000, pleads a cause of action in tort against Star-Kist Caribe, Inc. ("Star-Kist Caribe") and Star-Kist Foods, Inc. ("Star-Kist Foods"), for an injury suffered by minor-plaintiff Beatriz Blanco-Ortega, ten years old, who slit her right hand little finger while opening a can of tuna contained in a lunch kit manufactured and distributed by the Defendants. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1332(a) alleging diversity of citizenship between the Defendants and the Plaintiffs. (Docket # 1 ¶¶ 1-8). Plaintiffs allege that while they are citizens of Puerto Rico, the defendant corporations

[1] Also considered in this opinion are Plaintiff's "Partial Opposition" to Star-Kist's motion. (Docket # 17) and Defendants' reply to Plaintiff's Opposition. (Docket # 24).

are "organized under the laws of a state other than Puerto Rico, with principal offices in Newport, Kentucky." (*Id.* at ¶ 9).

However, on July 10, 2000 the Defendants filed a motion to dismiss alleging that Star-Kist Caribe is a wholly-owned subsidiary of Star-Kist, and that it is a *bona-fide,* separate and distinct corporate entity engaged in the packing and distribution of tuna products in Puerto Rico. In addition, the defendants assert that Star-Kist Caribe is fully capitalized and that it maintains corporate formalities, including board meetings and corporate books. Also, Star-Kist Caribe's board of directors has different members from Star-Kist's. Therefore, they allege that for diversity purposes, Star-Kist Caribe's citizenship must be considered separately and distinctly from Star-Kist's. (Docket #2 at 4).

On that issue, Star-Kist Caribe produced an unsworn statement under penalty of perjury signed by Janet Rich, Star-Kist's Corporate Secretary, who attests that Star-Kist Caribe is incorporated in the State of Delaware with an alleged principal place of business in Puerto Rico. (Docket #2, Attach. 1 ¶ 3). She also attests to the fact that Star-Kist Caribe is fully capitalized and holds board meetings and maintains corporate books. (*Id.* ¶¶ 4-5). In addition, she stated that "some of the members of the board of Star-Kist Caribe, Inc. are different than [sic] the members of the board of Star-Kist Foods, Inc." (*Id.* at ¶ 6). Also, that "the managerial offices of Star-Kist Caribe, Inc. are located in Puerto Rico." (*Id.* at ¶ 7). The office of the General Manager of Star-Kist Caribe is also located in Puerto Rico. (*Id.* at ¶ 8). Star-Kist Caribe owns and operates a tuna canning/ packaging center only in Puerto Rico. (*Id.* at ¶ 9). That tuna canning/packaging plant is managed by personnel in Puerto Rico. (*Id.* at ¶10). Finally, Star-Kist Caribe does not own or operate facilities outside of Puerto Rico. (*Id.* at ¶11).

Defendants' second exhibit is an unsworn declaration under penalty of perjury by Alfredo Archilla, Star-Kist

Caribe's Vice-President and General Manager, who attests to the same facts asserted by Ms. Janet Rich. (Docket # 2, Attach. 2). Based on these unsworn declarations, the Defendants argue that this case must be dismissed because of lack of complete diversity.

On August 21, 2000, Plaintiffs requested an extension of time to conduct limited discovery on the issue of Defendants' citizenship. (Docket # 6). Said motion was granted by the Court on August 28, 2000. (Docket # 8). On December 6, 2000—after several extensions of time related to discovery—the Plaintiffs filed a "Partial Opposition." (Docket # 17). Plaintiffs' opposition first alleges that Star-Kist Caribe's principal place of business, using the "control nerve center" test, is either Pittsburgh, Pennsylvania, or New Port, Kentucky. For that purpose, Plaintiffs produced evidence that establishes the following on their behalf: (1) that Star-Kist Caribe is incorporated in Delaware, (2) that its principal office is located at 900 Market Street in Wilmington, DE, although it is authorized to do business anywhere in the world; (3) that Star-Kist Caribe does not keep its business records in Puerto Rico. Its corporate books, accounting records, and other business records are kept under the custody of Mrs. Kimberly Kirkpatrick, Star-Kist Caribe's Secretary, whose offices are in Pittsburgh, PA. (Docket #17, App. G - Annex 3C); (4) Star-Kist Caribe's internal accountant and comptroller is Mr. Steve Rayburn, whose office is located in Pittsburgh, PA. (Docket # 17, App. G - Answer 1, and App. I, Resp. 3g); (5) the latest annual reports for Star-Kist Caribe could not be obtained neither from the Commonwealth Department of State, nor from the Defendants themselves through discovery, (Docket # 17, App. J); (6) that out of nine (9) officers and directors for whom Star-Kist Caribe produced addresses, only one (1) has an office in Puerto Rico (Mr. Alfredo Archilla, formerly Director, Vice-President, and since the year 2000, President of Star-Kist Caribe). All the other officers or directors have offices in Pennsylvania, Kentucky or California (Docket #

27, App. G); (6) no address was provided where the board of directors meetings take place; (7) there is some evidence adduced by the Plaintiffs which supports the inference that the H.J. Heinz Company ("Heinz"), Star-Kist and Star-Kist Caribe have common officers and directors and that they conduct their business outside of Puerto Rico. For example, Plaintiff presented evidence that Star-Kist Caribe's board members tender their resignation to the H.J. Heinz Company and that Star-Kist directors are the ones who approve and ratify the Star-Kist Caribe's appointees for directorships. (Docket # 27, App. G).

In the alternative, Plaintiffs' counsel argues that even if the Court finds that Star-Kist Caribe's principal place of business is Puerto Rico, the complaint should be maintained against Star-Kist. For that purpose, Plaintiffs argue that Star-Kist Caribe is not an indispensable party. (*Id.* at 2).

The Defendants replied that Star-Kist Caribe is an indispensable party because it has a substantial interest in the outcome of this litigation. For example, "more than likely, Star-Kist Caribe packed the can of tuna which is at the heart of this dispute." (Docket #24 at 12). Moreover, the Defendants cite caselaw indicating that "where the subsidiary is the primary participant in a dispute involving both the parent and the subsidiary, the subsidiary is an indispensable party." (*Id.*) (quoting *E&E Investment, Inc. v. Simmons, Co.*, 169 F.R.D. 467, 470 (D.P.R. 1996).

II. Analysis of Applicable Law

A. Jurisdiction

This court has original jurisdiction over civil actions between citizens of different states in which the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a). For that purpose, "[d]iversity must be complete: the citizenship of each plaintiff must be shown to be diverse from that of each defendant." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74, 98 S.Ct. 2396, 2402-03, 57 L.Ed.2d 274 (1978). Where corporations are concerned, they are

considered citizens of both the State of incorporation and the State where they maintain their principal place of business. 28 U.S.C. § 1332(c)(1); *Toste Farm Corp. v. Hadbury, Inc.*, 70 F.3d 640, 642 (1st Cir. 1995).

In this particular case, it is undisputed that co-defendant Star-Kist Caribe is incorporated in the State of Delaware. At issue is whether its principal place of business is Puerto Rico. That determination shall be made considering the facts as they existed at the commencement of the case. *Toste Farm Corp.*, 70 F.3d at 642. On that issue, plaintiff bears the burden of proof. *Alicea-Rivera v. Sindicato de Aseguradores*, 12 F.Supp.2d 243, 245 (D.P.R. 1998), citing *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) and *Hawes v. Club Ecuestre El Comandante*, 598 F.2d 702 (1st Cir. 1979) ("Since statutes conferring diversity jurisdiction must be strictly construed, where a plaintiff's claim of diversity is challenged, the plaintiff has the burden of proof."). Moreover, plaintiff cannot rely on unsubstantiated allegations to satisfy this burden. *Media Duplication Serv., Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1235 (1st Cir. 1991) ("Once jurisdictional allegations are challenged, the party asserting diversity has the burden of establishing those allegations with competent proof. No presumption of truthfulness attaches to the allegations.").

When the principal place of business of a corporation is involved, the First Circuit has established that any of three tests may be used to determine its location. *See Walker v. Pueblo Int'l, Inc.*, 569 F.2d 1169, 1171 (1st Cir. 1978). These three tests are "distinct, but not necessarily inconsistent." *Id.* The first, the "nerve center test" establishes that a corporation's principal place of business is "the center from which a multifaceted corporation's officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective." *Id.* at 1172 (internal quotations and parenthesis omitted). The second, "the center of corporate activity test" looks to the place where the corporation's day-to-day management is

carried out. *Id.* A third test focuses on "the locus of the operations of the corporation," *Id.*, that is, "where the bulk of the corporation's actual physical operations are located." *Topp v. CompAir Inc.*, 814 F.2d 830, 834 (1st Cir. 1987) (citing *Inland Rubber Corp. v. Triple A Tire Service, Inc.*, 220 F.Supp. 490 (S.D.N.Y. 1963)).

Applying these tests, the First Circuit has held that a corporation has its principal place of business in that State where it operates independently from its parent company, where it keeps all of its corporate records, ledgers and accounts, and where it is "directed and controlled by [its] officers." *Rodriguez v. SK & F Co.*, 833 F.2d 8, 9 (1st Cir. 1987). Moreover, in the parent-subsidiary context, the First Circuit has stated that there are "two unremarkable propositions: (1) that in determining a corporation's principal place of business, a district court's inquiry must focus solely on the business activities of the corporation whose principal place of business is at issue; and (2) that an exception to this general rule applies where there is evidence that the separate corporate identities of a parent and subsidiary have been ignored." *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 62-3 (1st Cir. 1993). If the corporate veil between parent and subsidiary is observed,[2] the fact that the parent corporation "[i]s ultimately the sole beneficiary and director of the subsidiary's corporate activities" is of no consequence for diversity purposes. *Id.* at 62. (quoting *Walker v. Pueblo Int'l*, 569 F.2d at 1171).

In *Taber*, the First Circuit concluded that a partnership whose "sole corporate 'activities' consist of holding or administering their assets in [the subject corporation], and that all such administering occurs exclusively in New York,"

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[2] The court's exact words where if "there is nothing in the record to undermine the parent's claim that the two corporations were separately incorporated, had separate boards of directors, kept separate accounting and tax records, and had separate facilities and operational personnel. . ." *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57 at 62 (quoting *Walker*, 569 F.2d at 1171).

was domiciled in New York under either of the three tests. 987 F.2d at 63. In any case, it is clear that "what is sought, except in rare circumstances where the corporate veil is properly disregarded, is the operational center of the corporation in question, giving proper regard to the corporate identity—not necessarily the ultimate 'nerve center,' in the sense of the place where the real power resides." *Topp v. CompAir Inc.*, 814 F.2d at 835 n.4.

In this particular case, the Plaintiffs do not argue that the corporate veil between Star-Kist and Star-Kist Caribe has been disregarded by the companies. Accordingly, the Court disregards Star-Kist's parent status from the determination of Star-Kist Caribe's principal place of business. For that purpose, the Court shall only consider the evidence in the record as provided by the parties: (1) the unsworn statements under penalty of perjury signed by Janet Rich, Star-Kist's Corporate Secretary and Alfredo Archilla, Star-Kist Caribe's Vice-President and General Manager; (2) Star-Kist Caribe's Certificate of Incorporation; (3) Defendants' answers to the interrogatories submitted by the Plaintiffs; (4) Star-Kist's reports filed at the Commonwealth State Department; (5) Plaintiffs' exhibits regarding the meetings of the board of directors, (Docket # 17, Ex. G); (6) letters of resignation by Mr. Charles K. Johnson and Ms. Diane B. Owen, (*Id.*); and (7) Defendants' supplementary answers to interrogatories. (Docket # 17, Ex. I).

All of these documents show that Star-Kist Caribe owns and operates a canning/manufacturing plant in Mayagüez, Puerto Rico and that the company sells canned tuna primarily to its parent company, Star-Kist. However, during the period prior to filing the complaint (from 1998-1999) only one of three Star-Kist Caribe's Vice Presidents had offices in Puerto Rico (Mr. Alfredo Archilla); (Docket # 17, Ex. G). Although Defendants' answers to the interrogatories are incomplete, the Court can gather that during the year 2000, only Star-Kist Caribe's President and Director, Mr. Alfredo Archilla, has offices in Puerto Rico. Star-Kist

Caribe's two Vice-Presidents, Messrs. Edward J. McMenamin and Barry A. Mills have offices in Pittsburgh, PA and Newport, KY. Star-Kist's Corporate Secretary, and its three Corporate Assistant Secretaries have offices in Pittsburgh, PA and Newport, KY. Its two Assistant Treasurers for the year 2000 have offices in Long Beach, CA and Pittsburgh, PA. (*Id.*) The company's General Manager of Human Resources, Mr. Jim Huffmyer, has offices in Pittsburgh, PA, and its Comptroller, Mr. Steve Reyburn also has offices in Pittsburgh, PA. (*Id.*) In addition, the official business records, including corporate books and minutes are kept under the custody of Ms. Kimberly Kirkpatrick, Corporate Secretary, in Pittsburgh, PA.

From this evidence the Court can gather that Star-Kist Caribe's principal place of business is not as clear or easy to determine as the Defendants would have the Court believe. In addition, the Court notes that the Defendants, being in control of the information which can clarify the issue, have only filed two unsworn declarations under penalty of perjury, one by Janet Rich, Star-Kist's Corporate Secretary, and the other by Alfredo Archilla, Star-Kist Caribe's Vice-President and General Manager, both of which—with identical wording—provide conclusory statements regarding the facts in controversy. However, the unsworn declarations do state that Star-Kist Caribe pays taxes in Puerto Rico, a fact that is corroborated by Star-Kist Caribe's independent audit of financial statements for the fiscal year 1998-9. (PricewaterhouseCoopers, LLP, financial report, Docket #23, Ex. 3).

Plaintiffs argue that applying the "nerve center test" the Court should find that Star-Kist Caribe's controlling activities occur either in Pennsylvania or Kentucky, where most of its officers and directors have offices. No discovery was provided by the Defendants regarding the location of the company's board meetings despite its being requested, but available evidence would lead the Court to believe that they do not take place in Puerto Rico at all. However, even if that

were the case, the Court finds that Star-Kist Caribe' principal place of business is Puerto Rico, because the focus of the Court's inquiry is not where the ultimate power resides, but rather, where the day-to-day management of the corporation takes place, and on that issue the evidence indicates that it takes place in Puerto Rico.

In particular, the nerve center is preferable for corporations with "complex and farflung activities." *Topp v. CompAir, Inc.*, 814 F.2d at 834. For example, in *Topp*, the First Circuit applied the "nerve center" test to ascertain the principal place of business of a corporation which had no manufacturing, purchasing or sales facilities. Rather, the corporation's "principal function [was] to provide administrative and financial services to several of its subsidiaries." 814 F.2d at 834. The subsidiaries were located in five different states and the court there noted that "[a] percentage of CompAir Inc.'s servicing activities devoted to a given subsidiary will vary from time to time, [therefore] its own nerve center (the location from which CompAir Inc. controls and directs its servicing activities) is the most realistic indication of its principal place of business." *Id.* On the other hand, the First Circuit found that the other two tests which focus on the location of the physical operations of the corporation (i.e., factories, wharehouses, sales offices) were not appropriate in that case. *Id.* n. 3.

In this case however, Star-Kist Caribe is a manufacturer of canned products who owns and operates a plant in Mayagüez. That is definitely a determinative factor for the principal place of business under the "the locus of the operations of the corporation" test. *Id.* A third test, the "center of corporate activity test" focuses on the day-to-day management of the corporation, which pursuant to Alfredo Archilla's unsworn declaration under penalty of perjury, is Puerto Rico, where the company's packaging center is managed. (Docket # 2, Attach. 2 ¶¶ 8-9, 11).

Although the Court is inclined to find that Star-Kist Caribe's principal place of business is Puerto Rico after applying the "locus of operations of the corporation" test and the "center of corporate activity" test, both Plaintiffs and Defendants have engaged in a discussion of the nerve center test and its applicability to this case. That test requires the Court to consider:

> [1] Location of corporate headquarters;
>
> [2] location of directors meetings;
>
> [3] location from where corporate income tax returns are filed;
>
> [4] location of corporate records;
>
> [5] location of principal bank accounts;
>
> [6] location of corporate personnel who direct the daily operations of the corporation;
>
> [7] place where major policy decisions are made;
>
> [8] place which is designated in the charter or other corporate documents as the official headquarters of the company.

Topp v. CompAir, Inc., 814 F.2d at 837-8. The Defendants concede that its directors do not regularly meet in Puerto Rico (Factor # 2, above). In addition, the discovery revealed that the corporation's official business records and minutes are kept under the custody of the Corporate Secretary, Ms. Kirkpatrick, in Pennsylvania. (Factor 4, above) (*See* Docket # 17, App. G). Moreover, the scarce evidence before the Court indicates that with all probability all major policy decisions are made outside of Puerto Rico. On this issue, Plaintiffs introduced evidence which controverts Defendants' conclusory statement that Star-Kist Caribe's major decisions are made in Puerto Rico, (*See* Docket # 24 at 7),[3] and the

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[3] For example, Plaintiffs introduced evidence showing that with the exception of the Corporation's Vice-President and now President, Alfredo Archilla, all of the Defendants' officers and top executives have offices outside of Puerto Rico. (Docket # 17, App. G). In addition, the

Defendants, being in control of the information pertinent to this issue, failed to produce anything showing that they are in fact made here. Therefore, this is a factor which militates against the Defendants. (Factor # 7, above). Factor number eight (8) also works against the Defendants because the charter and other corporate document: list Delaware as the company's official or principal office. (See Docket # 17, App. G). The other factors point to Puerto Rico as the principal place of business. (Factors ## 1, 3, 5, 6) (*See* Docket # 24, Ex. 1). Although the factors are evenly divided on the "nerve center" test, the Court's finding on the other two tests that Star-Kist Caribe's principal place of business is Puerto Rico, definitely tips the scales against diversity jurisdiction.

B. Indispensable Party

The First Circuit has stated that once a district court has found one of the defendants to be non-diverse for purposes of diversity jurisdiction, it may dismiss the complaint only against that defendant if it is a dispensable party. However, if the defendant is indispensable, then the Court must dismiss the case as a whole, or remand it to state court. *Casas Office Machines, Inc. v. Mita Copystar America, Inc.*, 42 F.3d 668, 675 (1st Cir. 1994).

In this case, the Plaintiffs have alternatively moved the Court to dismiss the complaint only against the non-diverse party—that is, assuming the Court found lack of complete diversity. The Defendants' have opposed this request citing *E&E Investment, Inc v. Simmons Co.*, 169 F.R.D. 467, 470 (D.P.R. 1996), which stands for the proposition that "where the subsidiary is the primary participant in a dispute

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(continued...)

Defendants have conceded that Star-Kist Caribe's Board of Directors does not regularly meet in Puerto Rico. In particular, a decision to transfer all of Star-Kist Caribe's can manufacturing operations to Star-Kist and other Heinz subsidiaries, was a decision not taken by the managing personnel in Puerto Rico. (*Id.*)

involving both the parent and the subsidiary, the subsidiary is an indispensable party." They then argue that "more likely than not" the tuna can involved in this products liability action was manufactured in Puerto Rico, therefore it would be "highly impractical" to dismiss the complaint against Star-Kist Caribe and to maintain the action against its parent company, Star-Kist.

The Plaintiffs have indicated however, that Star-Kist Caribe is a dispensable party to this litigation because Star-Kist and Star-Kist Caribe are joint tortfeasors in a products liability action, and that each entity involved in the chain of distribution is strictly liable to the consumer. (Docket # 17 at 10).

It has indeed long been established that joint tortfeasors are not indispensable parties. *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7; 111 S.Ct. 315, 316 (1991) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.") (citing *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329-330, 75 S.Ct. 865, 869, 99 L.Ed. 1122 (1955); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 132, 32 S.Ct. 641, 644, 56 L.Ed. 1009 (1912)). The issue of whether or not Star-Kist Caribe is an indispensable party based on the fact that it might have canned and distributed the actual can involved in this litigation, is not dispositive of the question because Plaintiffs have plead a cause of action in products liability, where as a matter of public policy, each and every entity involved in the chain of distribution is strictly liable to the consumer. *See Ferrer v. Gen. Motors*, 100 D.P.R. 246, 257-8 (1971).

Under Fed.R.Civ.P. 19(a), a party shall be joined to an action if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the

> person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of obligations by reason of the claimed interest.

Fed.R.Civ.P. 19(a).

In turn, Rule 19(b) of the Federal Rules of Civil Procedure provides that:

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed.R.Civ.P. 19(b).

The Defendants cite the case of *H.D. Corp. of Puerto Rico v. Ford Motor Co.*, 792 F.2d 987, 993 (1st Cir. 1986), for the proposition that where a parent and subsidiary are both parties to a suit, the action cannot be dismissed against the parent, and maintained against the subsidiary because "it would be highly impractical to permit plaintiffs' action to proceed solely against [the parent]." However, placing that asseveration in the context of that case, the First Circuit found the non-diverse/parent party indispensable based on the following: first, that the parent had a substantial interest in the outcome of the suit; and second, that "it is clear from the face of the complaint that plaintiffs' commonwealth law claims are largely directed against the parent company." *Id.*

The case involved various claims of breach of a dealership contract of which the parent was a signatory. In addition, the parent company was very much involved in the decision to terminate the dealership agreement. *Id.* Therefore, in that case it was "highly impractical" to permit plaintiffs' action to proceed solely against the subsidiary. *Id.*

Those circumstances are not present in this case however. In this case, the defendant does not controvert Plaintiffs' allegations that Star-Kist and Star-Kist Caribe are joint tortfeasors. On this point, the case-law is clear that "Rule 19 treats joint tortfeasors differently than persons jointly liable under a contract, where the general rule is that all those with a substantial interest in the contract must be joined." *H&E Investment, Inc. v. Simmons Company*, 169 F.R.D. 467 (D.P.R. 1996). In fact, the First Circuit has stated that "if one thing is clear in respect to Rule 19, it is that, unlike a person vicariously liable in tort, a person potentially liable as a joint tortfeasor is not a necessary or indispensable party, but merely a permissive party subject to joinder under Rule 20." *Pujol v. Shearson American Exp., Inc.*, 877 F.2d 132, 137 (1st Cir. 1989) (citations omitted).

Finally, Plaintiffs complaint does not make specific allegations against Star-Kist Caribe. Rather, Plaintiffs claim that the tuna can included in the lunch kit is a dangerous product, specially to children, and that there were no warnings in that respect. For a finding on the merits of this allegation, the place of manufacture is irrelevant. Therefore, Star-Kist and Star-Kist Caribe's motion to dismiss, (Docket #2), is **GRANTED IN PART AND DENIED IN PART**. Judgment shall be entered dismissing the complaint against Star-Kist Caribe, in accordance with the terms of this Opinion and Order.

SO ORDERED.

In San Juan, Puerto Rico, this 31st day of January, 2001.

/s/ Salvadore E. Casellas
SALVADORE E. CASELLAS
United States District Judge

[Dated Feb. 28, 2001]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MARIA DEL ROSARIO ORTEGA and SERGIO BLANCO, by themselves and representing minors BEATRIZ BLANCO ORTEGA and PATRIZIA BLANCO ORTEGA, Plaintiffs	*	CIVIL NO. 00-1475 (SEC)
vs.	*	CIVIL ACTION
STAR-KIST FOODS , INC.; and INSURANCE COMPANIES XYZ Defendants	*	**Plaintiffs Demand Trial By Jury**

FIRST AMENDED COMPLAINT

TO THE HONORABLE COURT:

Plaintiffs, through their undersigned attorneys, for their cause of action respectfully allege as follows:

I

Jurisdiction and Venue

1. This is a tort action based on products liability due to the negligence of the defendant, Star-kist Foods, Inc. ("Starkist"), who markets and sells in Puerto Rico lunch kits which contain a pull-top easy-open can of tuna that when opened have a sharp edge lid which is dangerous to people, specially children, and have no warning to this respect.

2. On April 21, 1999, one of the before mentioned lids injured Beatriz Blanco Ortega's right-hand little finger when she opened one of the mentioned cans of tuna.

3. Plaintiffs are all citizens of Puerto Rico.

4. Defendant is a citizen of a state other than Puerto Rico.

5. The matter in controversy exceeds $75,000 exclusive of interests and costs.

6. The can of tuna was sold in Puerto Rico.

7. The cause of action arose in Puerto Rico and the witnesses are in Puerto Rico.

8. Based on the before stated, jurisdiction of this court lies in diversity of citizenship, pursuant to 28 U.S.C. Sec. 1332(a) and venue lies in this district.

II

The Parties

9. Starkist is a corporation, organized under the laws of a state other than Puerto Rico, with principal offices in Newport, Kentucky, dedicated to the manufacture, distribution, and sale of processed tuna.

10. Codefendants XYZ Insurance Companies are the fictitious names of the insurance companies, which had issued and maintained in full force and effect an insurance policy on behalf of Starkist under whose terms and conditions they are jointly and severally liable with its insured for the facts and damages herein, and assumes the citizenship of their insured. Once the identities of said insurance companies are known, the plaintiffs will request leave to amend the complaint to incorporate their correct names.

11. Plaintiff Maria del Rosario Ortega (Mrs. Rosario) is a resident of Puerto Rico and is the divorced mother and legal guardian with custody over her minor daughter, Beatriz Blanco Ortega and Patrizia Blanco Ortega.

12. Plaintiff Sergio Blanco (Mr. Blanco) is a resident of Puerto Rico and is the divorced father and legal guardian of Beatriz Blanco Ortega.

13. Plaintiff, Beatriz Blanco Ortega ('Beatriz") is ten (10) years old, a resident of Puerto Rico, and the youngest daughter Mrs. Ortega and Mr. Blanco.

14. Plaintiff Patrizia Blanco Ortega is a minor and the oldest sister of Beatriz Blanco Ortega; she is a citizen of Puerto Rico.

III
The Facts

15. Starkist is engaged in interstate commerce as a manufacturer and or packer and or distributor and or retailer of canned tuna that is sold to the public or consumers through various wholesalers and or retailers.

16. For various years, Starkist has been doing business and selling canned tuna in different forms and methods in Puerto Rico, either by itself or through various wholesalers, retailers or distributors.

17. On or about April 21, 1999, while Beatriz was at her school lunch break, at "Academia Perpetuo Socorro", in San Juan, Puerto Rico, she opened a can of tuna in a Starkist Charlie's Tuna Salad Lunch Kit ("the lunch kit") which is manufactured and or placed in the market for sale and or distribution by the defendant.

18. The lunch kit had been purchased a few days before by Beatriz's mother, Mrs. Ortega, at "Supermercado Amigo", located at "Galeria Los Paseos" Shopping Mall, where she does all of her groceries' shopping.

19. Mrs. Ortega had selected and placed the lunch kit in her daughter's lunch box because, among other reasons, the lunch kit was represented by Starkist to be of good taste, enjoyable, and easy to prepare, which made it ideal for children to bring to school for lunch brakes.

20. Beatriz opened the lunch kit's can of tuna following the instructions of the package.

21. While doing so she slit her right-hand little finger with the sharp edge of the lid of the can, which caused her injuries.

22. Beatriz's injury was of such nature that she had to be taken by her mother to the Emergency Room of the Ashford Presbiterian Hospital in San Juan, Puerto Rico, where she was referred to a hand's specialist.

23. The hand's specialist determined that Beatriz finger's flexor tendon and digital nerve needed to be repaired and recommended surgery.

24. Because there were no operating rooms available, Beatriz had to wait for surgery until April 22, 1999.

25. After surgery Beatriz suffered difficulties as a result of the anesthesia.

26. Thereafter Beatriz had to remain with a cast on her right arm that had a string sown to her finger nail in order to protect the tendon and keep the finger bent which gave her a weird appearance.

27. In order to recover the movement lost in her right-hand little finger Beatriz had to receive physical therapy which caused her pain and anguish.

28. However, as of this date, Beatriz's finger has not fully recovered and is still bent which makes her hand to look awkward and strange.

IV
The Negligence and Direct Cause

29. The proximate and direct cause of Beatriz's injures is Starkist's negligence in manufacturing and or marketing and or distributing for public consumption a product that is unsafe to the consumer, particularly children.

30. Starkist also omitted a notice of precaution to be taken by children or for parents to be given to children, when opening a can that is unreasonably dangerous to a child, or to parents as consumers.

31. When Beatriz opened the can of tuna she was unaware of any danger to which she would be exposed as a result thereof.

32. All of the above caused injuries and damages to the plaintiffs.

33. The dangerous situation created by the defendants to which Beatriz was exposed was not known by her who at the time was nine years old.

34. Beatriz's parents relied on the safety of the product manufactured and or marketed and or distributed by the defendants.

35. Starkist was negligent in breaching its duty to place in the open market a product that is fit for public consumption, particularly children.

36. The breach of Starkist's duty was the direct cause of the injuries and damages sustained by the plaintiffs.

V

The Damages

37. Beatriz is a ten (10) year-old child who lives with her mother, has a good relationship with her father, attends school every day, and used to practice volleyball.

38. Due to defendants' negligence, Beatriz suffered a painful cut in her right-hand little finger and went through the horrifying experience of watching herself bleed profusely with no control over it.

39. This experience traumatized and caused her great emotional pain and suffering to the extent that she does not eat tuna fish anymore.

40. After surgery Beatriz had to suffer the discomfort and effect of general anesthesia; then for a prolonged period of time she underwent painful therapy.

41. Because of defendants' negligence, Beatriz's finger is bent, her hand appearance is awkward, and she has problems when writing.

42. To prevent her finger from bending, Beatriz needs to use a cast which she rejects and has developed antipathy to.

43. Due to defendants's negligence, Beatriz' parents and sister went through the anguishing experience of watching their younger daughter and sister being injured, nervous and in extreme pain, which has traumatized and caused them great emotional pain and suffering.

44. Both, Mrs. Ortega and Mr. Blanco have incurred in the following medical expenses:

45. Plaintiffs' damages are estimated in the following amounts:

A. Beatriz:

(1) Physical damages, not less than $500,000

(2) Emotional damages, not less than $400,000

B. Mrs. Ortega:

(1) Incurred medical expenses as of the date of this complaint $4,927.07

(2) Estimated future medical expenses $25,000

(3) Mental anguish and suffering $250,000

C. Mr. Sergio Blanco's emotional damages are estimated in the sum of $175,000

D. Patrizia Blanco Ortega emotional damages estimated in the sum of $150,000

WHEREFORE, plaintiffs pray for a judgment in their favor and against defendants, ordering payment of the amounts above mentioned, together with interests thereon from the date of filing of the present complaint, plus costs, and reasonable attorney's fees.

PLAINTIFFS DEMAND TRIAL BY JURY.

In San Juan, Puerto Rico, this 28th day of February, 2001.

I HEREBY CERTIFY that, on this same date, a true and exact copy of the foregoing was mailed to Alexander H. Bopp, Esq., Indiano & Williams, P.S.C,, Hato Rey Tower, Suite 2101, 268 Muñoz Rivera Avenue, Hato Rey, Puerto Rico 00918.

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By: /s/ Freddie Pérez-González
Freddie Pérez-González
UDSC-PR 119005

[Dated April 10, 2001]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MARIA DEL ROSARIO ORTEGA and SERGIO BLANCO, by themselves and representing minors BEATRIZ BLANCO ORTEGA and PATRIZIA BLANCO ORTEGA, Plaintiffs,	*	CIVIL NO. 00-1475 (SEC)
vs.	*	**Plaintiffs Demand Trial By Jury**
STAR-KIST FOODS, INC., and INSURANCE COMPANIES XYZ, Defendants.	*	

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ANSWER OF DEFENDANT STAR-KIST FOODS, INC. TO PLAINTIFFS' FIRST AMENDED COMPLAINT

TO THE HONORABLE COURT:

NOW APPEARS defendant, STAR-KIST FOODS, INC. (hereinafter Star-Kist Foods), through the undersigned attorneys, and respectfully state, allege and request as follows:

I. JURISDICTION AND VENUE

1. The allegations contained in paragraph 1 of the Complaint are denied.

2. The allegations contained in paragraph 2 of the Complaint are denied.

3. The allegations contained in paragraph 3 of the Complaint are admitted.

4. The allegations contained in paragraph 4 of the Complaint are admitted as they pertain to Star-Kist Foods.

5. The allegations contained in paragraph 5 of the Complaint are denied.

6. The allegations contained in paragraph 6 of the Complaint are denied as beyond the knowledge of Defendant.

7. The allegations contained in paragraph 7 of the Complaint are denied.

8. The allegations contained in paragraph 2 of the Complaint are denied.

II. THE PARTIES

9. The allegations contained in paragraph 9 of the Complaint are denied.

10. The allegations contained in paragraph 10 of the Complaint are denied.

11. The allegations contained in paragraph 11 of the Complaint are admitted based on information and belief.

12. The allegations contained in paragraph 12 of the Complaint are admitted based on information and belief.

13. The allegations contained in paragraph 13 of the Complaint are admitted based on information and belief.

14. The allegations contained in paragraph 14 of the Complaint are admitted based on information and belief.

III. THE FACTS

15. The allegations contained in paragraph 15 of the Complaint are denied.

16. The allegations contained in paragraph 16 of the Complaint are denied.

17. The allegations contained in paragraph 17 of the Complaint are denied.

18. The allegations contained in paragraph 18 of the Complaint are denied as beyond the scope of Defendant's knowledge.

19. The allegations contained in paragraph 19 of the Complaint are denied.

20. The allegations contained in paragraph 20 of the Complaint are denied as beyond the scope of Defendant's knowledge.

21. The allegations contained in paragraph 21 of the Complaint are denied.

22. The allegations contained in paragraph 22 of the Complaint are denied as beyond the scope of Defendant's knowledge.

23. Paragraph 23 of the Amended Complaint contains a typographical error rendering it incoherent. To the extent a responsive pleading is possible, the allegations contained in paragraph 23 of the Complaint are denied as beyond the scope of Defendant's knowledge.

24. The allegations contained in paragraph 24 of the Complaint are denied as beyond the scope of Defendant's knowledge.

25. The allegations contained in paragraph *25* of the Complaint are denied as beyond the scope of Defendant's knowledge.

26. The allegations contained in paragraph 26 of the Complaint are denied as beyond the scope of Defendant's knowledge.

27. The allegations contained in paragraph 27 of the Complaint are denied as beyond the scope of Defendant's knowledge.

28. The allegations contained in paragraph 28 of the Complaint are denied as beyond the scope of Defendant's knowledge.

IV. THE NEGLIGENCE AND DIRECT CAUSE

29. The allegations contained in paragraph 29 of the Complaint are denied.

30. The allegations contained in paragraph 30 of the Complaint are denied.

31. The allegations contained in paragraph 31 of the Complaint are denied.

32. The allegations contained in paragraph 32 of the Complaint are denied.

33. The allegations contained in paragraph 33 of the Complaint are denied

34. The allegations contained in paragraph 34 of the Complaint are denied.

35. The allegations contained in paragraph 35 of the Complaint are denied.

36. The allegations contained in paragraph 36 of the Complaint are denied.

V. DAMAGES

37. The allegations contained in paragraph 10 of the Complaint are outside the scope of knowledge of the defendant, Star-Kist Foods, Inc. As such, the allegations are denied.

38. The allegations contained in paragraph 38 of the Complaint are denied.

39. The allegations contained in paragraph 39 of the Complaint are denied.

40. The allegations contained in paragraph 40 of the Complaint are denied.

41. The allegations contained in paragraph 41 of the Complaint are denied.

42. The allegations contained in paragraph 42 of the Complaint are denied.

43. The allegations contained in paragraph 43 of the Complaint are denied.

44. The allegations contained in paragraph 44 of the Complaint are denied. To the extent paragraph 44 indicates that Mrs. Ortega and Mr. Blanco incurred no medical expenses, Defendant accepts this allegation as true.

45. The allegations contained in paragraph 45 of the Complaint are denied.

VI. AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The allegations of Plaintiffs' Complaint fail to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are estopped due to their negligence in willfully destroying the evidence which is at the heart of their complaint.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitation and/or statutes of repose.

FOURTH AFFIRMATIVE DEFENSE

Star-Kist Foods asserts that its products were not unreasonably dangerous, nor is Star-Kist Foods in any way negligent and Plaintiffs cannot recover under their complaint, because the actions and products referred to in Plaintiffs' Complaint conformed to the state of the art and the applicable standards of care for the design and manufacture of such or similar products.

FIFTH AFFIRMATIVE DEFENSE

In the alternative, and in the event the Plaintiffs have suffered any legally cognizable injury or damages, which is denied, there is no proximate or other causal connection between the actions or failure to act on the part of Star-Kist Foods and the damages, injuries and/or losses alleged by Plaintiffs.

SIXTH AFFIRMATIVE DEFENSE

The occurrences and injuries made the basis of this lawsuit were proximately caused and/or produced by the acts and omissions of a third person or persons or party or parties over whom Star-Kist Foods had no control or right of control

at the time of the occurrence or injury in question, and such conduct was the proximate and/or sole proximate, and/or producing and/or sole producing and/or new and independent cause of any injuries or damages to the Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

Star-Kist Foods asserts the defense of contributory or comparative negligence and alleges that the damages and injuries alleged in Plaintiffs' Complaint were legally or proximately caused in whole or in part by the negligence, fault, negligence per se, assumption of the risk, product alteration, misuse, and culpable conduct of other persons or parties who failed to exercise the same degree of care and caution, as well as common sense, for their safety, as would have been exercised by persons using ordinary care, caution and common sense in the same or similar circumstances. Star-Kist Foods is therefore entitled to have the court and jury apply the doctrine of comparative negligence established by Commonwealth of Puerto Rico Civil Code §5141 and other relevant statutes and code sections to reduce any judgment against Star-Kist Foods by the degree of negligence or fault attributable to any other person or party.

EIGHTH AFFIRMATIVE DEFENSE

Star-Kist Foods asserts that Plaintiffs' injuries and damages, if any, are the result of the failure of Plaintiffs to exercise that degree of care for their own personal health and safety that a reasonably prudent person would have exercised under the same or similar circumstances.

NINTH AFFIRMATIVE DEFENSE

Any injuries or damages allegedly sustained by Plaintiffs were caused in whole or in part by preexisting physical, mental, emotional and psychological conditions of the plaintiffs for which Star-Kist Foods has no legal responsibility or liability.

TENTH AFFIRMATIVE DEFENSE

If Plaintiffs sustained the injuries or incurred the expenses alleged, the same may have been caused, in whole or in part, by an operation of nature or act of God and are not the result of Star-Kist Foods' conduct.

ELEVENTH AFFIRMATIVE DEFENSE

Star-Kist Foods asserts that this action is governed by the "learned intermediary," "informed intermediary" and/or "sophisticated user" doctrines and that Plaintiffs' claims are barred, in whole or in part, because Star-Kist Foods had no obligation to warn Plaintiffs directly of any condition associated with the products in question.

TWELFTH AFFIRMATIVE DEFENSE

If Plaintiffs sustained the injuries or incurred the expenses alleged in Plaintiffs' Complaint, the same may have been caused by an idiosyncratic reaction, without any negligence, defect failure on the part of Star-Kist Foods.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs may have failed to join identifiable and indispensable parties necessary for proper adjudication.

FOURTEENTH AFFIRMATIVE DEFENSE

If Star-Kist Foods is held liable to plaintiffs, which liability is specifically denied, Star-Kist Foods would be entitled to a set-off for all sums of money received or available from or on behalf of any tort-feasor for the same damages as alleged in Plaintiffs' Complaint.

FIFTEENTH AFFIRMATIVE DEFENSE

At the time of the occurrence of the injuries alleged by Plaintiffs, Star-Kist Foods' products were not defective or unreasonably dangerous in their design, manufacture or marketing. Moreover, the warnings and instructions accompanying Star-Kist Foods' products at the time of the occurrence of the injuries alleged by Plaintiffs were adequate as a matter of law.

SIXTEENTH AFFIRMATIVE DEFENSE

Star-Kist Foods complied with all governmental standards and regulations in the manufacture, sale, registration and labeling of the product.

SEVENTEENTH AFFIRMATIVE DEFENSE

Any and all damages alleged by Plaintiffs may have been caused by misuse or abuse of Star-Kist Foods' products, failure to use Star-Kist Foods' products properly, and/or alteration or negligent use of Star-Kist Foods' products, for which Star-Kist Foods is not legally or factually responsible.

EIGHTEENTH AFFIRMATIVE DEFENSE

Star-Kist Foods is not engaged in the manufacturing, nor the packing, of tuna cans.

WHEREFORE, Defendant Star-Kist Foods Corporation requests that Plaintiffs take nothing by this action, that the court dismiss this action with prejudice, that Star-Kist Foods recover its costs and that Star-Kist Foods have such other and further relief to which it may show itself to be justly entitled.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 10th day of April, 2001.

I HEREBY CERTIFY that a true copy of the forgoing document has been sent by regular mail to **Freddie Pérez-Gonzalez**, P.O. Box 193729, San Juan, Puerto Rico 00919-3729.

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